No. 82-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH M. MARGIOTTA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. This case poses the issue whether Petitioner, a Republican Party leader, was correctly held to have violated the mail fraud statute, 18 U.S.C. § 1341, based on the unprecedented theory that:

(a) private citizens who are active in the political process owe the same fiduciary duty of "honest and loyal" service to the general electorate as that owed by public officials;

(b) Petitioner became such a quasi-governmental fiduciary as a result of his position in the Republican Party and was therefore required to make public disclosure of all "material" information, including any "bias" or "conflict of interest" relating to his political activities and patronage recommendations, and

(c) Petitioner's non-disclosure of his alleged bias and conflict in this case deprived the public of its "intangible right" to his loyal fiduciary services and hence violated the mail fraud statute, notwithstanding the absence of any economic injury or loss to anyone.

1. In defending these remarkable propositions, the government's brief relies solely on the false premise that

Petitioner was a "de facto public official" who "in fact controlled the governmental decision-making process . . . ." (G. Br. i, 5). That argument is a gross distortion of the charge in the indictment, the trial court's findings following the first trial, the evidence presented at the second trial, and the offense as defined in the jury instructions.

First, the indictment did not allege that Petitioner controlled governmental decision-making, but merely that his Party position gave him "great influence" over public officials who had been Republican Party candidates. (A. 14).[1] The government's brief below expressly conceded that "[t]he indictment did not allege that he exercised *de facto* control . . . ." (G. Br. 57, n.31).

Second, in discussing the extortion charges following the first trial, the trial court expressly held that Petitioner was *not* a *de facto* public official exercising control over governmental decision-making. (A. 88-90). Emphatically rejecting the government's position, the trial court concluded that it would not, "in any sense, be a reasonable conclusion that defendant had such powers as a result of his participation in County government . . . ." (A. 89). The trial court found that "[t]he only participation concerning which there was evidence at trial was that defendant was consulted about and recommended the appointment of officials and employees to various positions in local government." (A. 89-90). As the trial court specifically held, patronage recommendations were Petitioner's "*only participation*" in governmental affairs.

Third, the evidence at the second trial once again showed that Petitioner's role consisted of nothing more than political patronage recommendations. This traditonal party function was performed at the request of Republican public officials who sought political clearance from the Republican Party organization for hirings, raises and promotions in certain non-civil service posi-

[1] References herein to "A." are to the Appendix in the Court of Appeals.

tions. Petitioner's own approval was sought only for certain high-level appointments, such as County or Town attorneys and deputy department heads. (A. 585-91, 681). The government contends that Petitioner had a "vice-like grip" (G. Br. 2), but when County Executive Caso had a political "break-up" with Petitioner from 1975 through 1977, Caso no longer communicated with Petitioner or Republican headquarters regarding patronage and dismissed several high-level County employees who were supporters of Petitioner. (A. 667-69). As a consequence, the Republican Party exercised no political clearance at all for County positions between 1975 and 1977.[2]

Contrary to the government's belief (G. Br. 9), there was nothing "unique" about the political role of Petitioner and the Republican Party, nor was the jury asked to find that there was. Petitioner's approval function was no different from the political clearance given today for Executive Branch appointments by the Chairman of the National Republican Party. Moreover, the unchallenged trial testimony showed that the Republican Party's political clearance system was no different from the system that had existed under the prior Democratic administration and was already in effect when Petitioner became Town Republican Chairman in 1967. (A. 618, 632-34; 817-18).

Fourth, the jury instructions likewise did not require any finding that Petitioner was a *de facto* public official or had *de facto* control over government. They were instead based on the looser and even more nebulous notion of "participation in Governmental affairs," which amounted to a

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[2] The patronage system was run by the regular Party employees and local Party officials, with no participation at all by Petitioner in the great majority of instances. The Party's involvement was strictly limited to personnel decisions in the non-civil service. Apart from making a political recommendation for the broker designation (*which both the panel majority and the trial court agreed was not a public office* (Pet. App. 32a)), Petitioner and the Republican Party had no involvement in municipal insurance matters.

simple "reliance" test. To conclude that Petitioner was a quasi-governmental fiduciary, the jury was required to find nothing more than that Petitioner's "participation [in the 'affairs of Government'] is relied on by others in Government in order to carry forward the business of governing as a whole and with the intention of conducting and carrying forward affairs of the Government in which he participates." (A. 116). In no way does this instruction constitute a "control test." To the contrary, if a quasi-governmental fiduciary is anyone who is "relied upon by others in Government," then it surely embraces virtually every political party leader who makes patronage recommendations and virtually any head or representative of an effective lobbying group or influential special interest group. Rather than containing "explicit limitations" (G. Br. 7), the Court of Appeals' decision has unbounded scope.[3]

2. Even had Petitioner's conviction rested on a "*de facto* control" test, it would still be unprecedented and unwarranted. The government's ludicrous assertion that the decision below rests on "ample precedent" flies in the face of the Court of Appeals' own admission that "this [is a] case of first impression" presenting a "novel application of the mail fraud statute on an 'intangible rights' theory to a non-office holder such as Margiotta." (A. 20a). The present indictment and the court's charge have been described as representing a "quantum leap in the extension of the statute." Coffee, *supra*, at 143. The representative of the U.S. Attorney's Office responsible

[3] The unexceptional nature of Petitioner's political role, and hence the broad reach of the prosecution's mail fraud theory, have been noted in scholarly commentary. *See* Coffee, *From Tort To Crime: Some Reflections On The Criminalization of Fiduciary Breaches And The Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 146 (1981). ("The power held by a Republican Party Chairman to influence appointments in a particular county may be no greater than that held by the head of the AFL-CIO to influence the appointment of the Secretary of Labor or of the Executive Director of the NAACP to veto a proposed Chairman of the EEOC.")

for this prosecution has admitted that "[t]his is the first case in which someone who holds no government position has been convicted of committing a fraud on the public . . . ." *American Bar Association Journal*, vol. 69, p. 271 (March, 1983). The four dissenting judges thought the panel opinion to be so unsupported as to warrant *en banc* review.

The government simply ignores the indisputable fact that the fiduciary obligation alleged here—a duty to the general citizenry requiring "honest and faithful" participation in governmental affairs—has never before been recognized as a proper basis for a mail fraud violation where the defendant is a private citizen like Petitioner. Rather, it has been applied and defined strictly in terms of *public officials*. The Court of Appeals expanded the controversial "intangible rights" theory to mean that a *private citizen* who engages in political activity is subject to the same fiduciary standards that a government official owes to the public.[4]

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[4] In its attempt to conceal the novelty of the decision below, the government engages in an outrageous misrepresentation of Judge Winter's opinion. Its brief states: "As Judge Winter acknowledged in dissent, there is 'substantial and direct precedent' for the court's holding, which in any event was carefully 'limit[ed] . . . to the facts of this case' (*id.* at 63a, 65a)." Judge Winter actually said:

> "Given this sweeping charge and the majority opinion, *no amount of rhetoric seeking to limit the holding to the facts of this case can conceal that there is no end to the common political practices which may now be swept within the ambit of mail fraud.*" (Pet. App. 63a).
>
> "However logical this growth of the law may seem, it leads to a result which is not only greater than, but is roughly the square of, the sum of the parts. *The proposition that any person active in political affairs who fails to disclose a fact material to that participation to the public is guilty of mail fraud finds not the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation.*" (Pet. App. 65a). (Emphasis added).

The government's resort to the use of transposed and partial quotations to misrepresent Judge Winter's views tellingly demonstrates the untenability of its position in this case.

3. The government does not deny that the Court of Appeals' decision creates, for the first time, a federal common law of fiduciary duty under the mail fraud statute. The panel opinion expressly noted that its decision is contrary to this Court's decision in *Santa Fe Securities, Inc.* v. *Green*, 430 U.S. 462 (1977), which refused to create federal fiduciary standards under the anti-fraud provisions of Rule 10-b(5) of the federal securities act. (Pet. App. 29a). The government attempts to distinguish the *Santa Fe* decision on the nonsensical ground that the federal securities act uses the word "deception" while the fraud statute uses the words "scheme or artifice to defraud." (G. Br. 11). It nowhere explains why this choice of words is decisive in determining which of these two anti-fraud provisions authorizes a federal common law of fiduciary duty.

The issues in the present case are analogous to those in *Dirks* v. *Securities and Exchange Commission*, No. 82-276, as the government seems to concede by its silence. The importance of the question posed in *Dirks*—whether the anti-fraud provisions of the federal securities law can be construed to impose federal fiduciary duties on securities analysts—pales by comparison with the instant case. The federal fiduciary duty imposed on Petitioner is the lynchpin, not for mere civil penalties as in *Dirks*, but for criminal penalties in the area of constitutionally-protected conduct.[5]

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[5] Contrary to the government's suggestion, Petitioner's conviction does not alternatively rest on his status as a fiduciary under state law. The trial court never found any fiduciary status under state law, and the jury was not instructed on state law. The panel opinion held Petitioner to be a *federal* fiduciary and stated that "we need not examine state law. . . ." (Pet. App. 29a). Only in reference to the obvious federalism problem did the panel opinion declare, *in dicta*, that state law was consistent because it recognized that the "concepts" of reliance and de facto control were "at the heart of the fiduciary relationship." (*Id.*, at 31a). This assertion is disingenuous, since no New York case has ever held that any private citizen, much less a Party Chairman, becomes a quasi-governmental

4. Contrary to the government's assertion, Petitioner does indeed maintain that this prosecution violates his First Amendment rights. A Republican Party leader is constitutionally entitled to represent Republican Party interests, and the Republican Party is likewise entitled to the uncompromised fiduciary services of its own employee and party leader. To make Petitioner a quasi-governmental fiduciary based on his political party activity violates both his and his Party's First Amendment rights. Moreover, Petitioner received no fair notice or warning that he could be a quasi-governmental fiduciary under federal or state law as a result of his participation in political patronage.[6] No person should be deprived of his liberty on the basis of a duty that was acquired invisibly, unknowingly, and unwillingly and announced *ex post facto* by the jury's verdict of guilty. Nor should any person be held to have violated a criminal statute that gave no notice of its application. Judge Winter noted that there was "not the slightest basis in Congressional intent, statutory language, or common canons of statutory interpretation" for this result. (Pet. App. 65a). No case had ever hinted of this fiduciary duty or mail-fraud application, and even Judge Kaufman called it "novel." (*Id.*, at 20a).

B. The four dissenting judges below voted for *en banc* consideration of the entire case, including Petitioner's

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fiduciary on the basis of such "concepts." Judge Winter aptly called the panel opinion's conclusion "sheer *ipse dixit*." (*Id.*, at 61a n.2).

[6] The government's contention that Petitioner had "notice" because two New York statutes prohibit the purchase or sale of a "public office or place" ignores the trial court's ruling, affirmed by the Court of Appeals, that the broker designation was not a "public office or place" and that the statutes were inapplicable. Nor would these New York statutes, even had they been applicable, have given notice to Petitioner that under the federal mail fraud statute he could be a fiduciary for the general electorate. The constitutional requirement that the federal mail fraud statute give fair notice cannot be satisfied by reference to *state* statutes. Indeed, the government's "notice" argument expressly depends upon this Court reversing the lower courts' decision that these New York statutes were inapplicable.

conviction under the Hobbs Act, 18 U.S.C. § 1951.[7] Those counts rest on the unprecedented theory that a party leader's receipt of money on his party's behalf constitutes extortion "under color of official right" if he caused public officials to contribute "in a substantial way" in inducing the payment. (A. 143). Under the decision below, a party leader's simple receipt of money on his party's behalf, if induced in the above manner, constitutes "official" extortion, irrespective of the lack of any *quid pro quo*. As the jury was instructed, "there need be no promises with respect to official action in return for receiving the payment." (A. 142). Here, Petitioner was convicted of "official" extortion because he and the Republican Party received payments from the Williams Agency that were allegedly induced by the Agency's belief that County Executive Caso would designate and retain as insurance broker any person recommended by Petitioner. In short, Petitioner was held to have committed "official" extortion based on the alleged victim's perception of his political influence over public officials.[8]

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[7] The entire Petition would have to be granted even if only the mail fraud conviction was erroneous. The existence of concurrent sentences does not make consideration of the erroneous count an "advisory opinion" (G. Br. 15). *Benton* v. *Maryland*, 395 U.S. 784, 790 (1969). Moreover, the improper mail fraud count prejudiced the jury's consideration of the Hobbs Act counts. For example, the improper mail fraud count allowed the introduction of otherwise inadmissible evidence concerning Petitioner's partisan patronage activities and certain alleged payments, including to former Republican Judge D'Auria. The trial court's erroneous jury instructions on the mail fraud count further created the erroneous impression that Petitioner was a *de facto* public official, thus prejudicing the jury's consideration of the Hobbs Act counts.

[8] Because Petitioner was treated as if he were a public official, the jury was allowed to convict him without any finding or proof that he used or threatened force, violence or fear or that the Williams Agency was induced to make the payments by fear, including fear of economic loss. Instead, the trial court applied the rule for "official" extortion that the " 'fear' element on the part of the 'victim' [is] implied from the public official's position of authority over the victim." *United States* v. *Butler*, 618 F.2d 411, 418-19 (6th Cir.), *cert. denied*, 447 U.S. 927 (1980).

In creating this new crime of "political influence," the government eschews each and every one of the elements of "official" extortion. First, it asserts that "neither direct receipt [of the payment by the public official] nor personal transference to third parties" by the public official is required. (G. Br. 17). The classic definition of "official" extortion, however, is a public's official's wrongful use of his office to obtain money not due him or his office. *United States* v. *Nardello*, 393 U.S. 286, 289 (1959). The cases cited by the government involved a public official's direction of payments to others. Here, public official Caso was not the recipient, directly or indirectly, of any payments by the Williams Agency, nor did he direct any payments to third parties.

Second, the government concedes that public official Caso must have misused his office for there to have been "official" extortion but asserts that Caso's designation of the Williams Agency as broker constituted such misuse. However, Caso's involvement in traditional patronage was not a misuse of his office nor was it extortionate. It was undisputed that Caso was not party to any commission-sharing arrangement, did not request or even know about such sharing, and did not misuse his office to "induce the payment. . . ." *United States* v. *Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979).[9]

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[9] As one commentator has noted:

> "It is never clearly articulated by the Court of Appeals why, if Caso and the other officials did nothing improper, their actions (imputed to Margiotta) somehow became 'extortion.'
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> * * * *
>
> "Mr. Caso testified at the trial that he was unaware of the commission-splitting arrangement. There was no proof that he ever implied that the Williams Agency could have the business if it did or did not do some act . . . . [Caso's designation of the Agency] was not an indispensible element of the offense of *extortion* under color of official right. It was only an element in the causal chain of the fee-splitting arrangement; but that does not make it an indispensible element of the crime of ex-

Finally, the government ignores the requirement that the victim's "motivation for the payment focuse[d] on the recipient's [public] office." *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). In this case the "recipients," Petitioner and the Republican Party, held no public office. Obviously, the Agency's motivation could not have focused on the defendant's non-existent public office. And Caso, who held a public office, was not himself a recipient of any payments, never requested the payments, and was unaware of their existence.[10]

CONCLUSION

For the reasons stated, the petition should be granted.

Respectfully submitted,

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tortion." Obermaier, *Criminal Causation and Imputed Capacity*, N.Y.L.J. Jan. 4, 1983, p. 2, col. 1.

[10] The government's construction of the Hobbs Act makes the receipt of contributions by a political party or other special interest group unlawful if the donor was induced by a belief that the recipient organization possessed influence over public officials. Every political contribution made to a political party could be characterized as "official" extortion under this view. All that a public official need do is to "contribute in a substantial way to inducing" the campaign contribution. Here, the inaction of public official Caso and his successor Purcell (in not removing the Williams Agency's broker designation) sufficed to supply that minimal involvement. In the case of an ordinary campaign contribution, the attendance of a public official at a fund raiser would seem to suffice as "official" extortion.